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No. 82-627

In the Supreme Court of the United States

OCTOBER TERM, 1982

JAMES M. THOMSEN, TRAVIS GATUS,
JOHN M. BRENNAN, JERALD R. JACKI,
LARRY R. JOHNSON, ANTHONY T. PELLEGRINO,
Petitioners,

vs.

WESTERN ELECTRIC CO., INC.,
THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Is the ruling below—that internal management practices concerning the transfer of personnel within defendants' "corporate family" do not violate Section 1 of the Sherman Act—consistent with the decisions of this Court and the Courts of Appeals?

2. Is the decision below on the issue of standing consistent with the decisions of this Court?[1]

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1. The parties are set forth in the title; respondents Western Electric Co., Inc. and The Pacific Telepone and Telegraph Company are wholly owned subsidiaries of respondent American Telephone and Telegraph Company, which in turn owns stock in the following publicly owned corporations:
Southern New England Telephone Company
Cincinnati Bell, Inc.

TABLE OF CONTENTS

	Page
Statement of the Case	1
Argument	3
I. The ruling below—that internal management practices concerning the transfer of personnel within defendants' "corporate family" do not violate Section 1 of the Sherman Act—is consistent with the decisions of this Court and the Courts of Appeals	4
II. The court below did not rule that only customers and competitors have standing to assert Sherman Act Section 2 violations. In any event, the court below properly ruled that, independent of any standing issue, the monopolization alleged by petitoners was not causally related to petitioners' alleged injuries	6
Conclusion	7

TABLE OF AUTHORITIES

Cases	Pages
AT&T, 64 F.C.C.2d 1	2
Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211	4, 5
Perma Mufflers v. Int'l Parts Corp., 392 U.S. 134	5
United States v. Yellow Cab. Co., 332 U.S. 218	5

Statutes

Sherman Act	
Section 1 (15 U.S.C. § 1)	2, passim
Section 2 (15 U.S.C. § 2)	2, passim

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STATEMENT OF THE CASE

Petitioners' statement of the facts contains many assertions not supported by the record. The relevant facts, which are summarized in the opinions of the district court and the Court of Appeals, are as follows:

Respondent American Telephone and Telegraph Company ("AT&T") is the parent company of the Bell System (Pet.Appx., p. 2a). The Bell System includes AT&T, respondent Western Electric Co., Inc. ("Western Electric"), and twenty-three operating telephone companies, including respondent The Pacific Telephone and Telegraph Company ("Pacific") (Pet.Appx., p. 2a). Western Electric, a wholly

owned subsidiary of AT&T, manufactures and installs telecommunications equipment for, and acts as a purchasing agent for, the Bell System companies (Pet.Appx., p. 3a). Pacific, which was an 89.9% owned subsidiary of AT&T during the time in question[2], provides telephone service within California (Pet.Appx., p. 3a).

The Bell System is "centrally managed by AT&T" and "virtually all important policies and practices are centrally developed, reach[ing] all parts of the Bell System" (Pet. Appx., p. 11a; quoting the FCC's holding in *AT&T* (1977) 64 F.C.C.2d 1, 13, n. 21; Pet.Appx., p. 11b). Thus, for example, the Bell System companies file a single consolidated federal income tax form, use a common logo, and conduct labor negotiations on a system-wide basis (Pet.Appx., pp. 11b-12b). Research and development of products and services is coordinated by AT&T through Bell Laboratories for the whole system (Pet.Appx., pp. 12a, 11b). And, management and nonmanagement personnel are routinely loaned between Western Electric and the local operating companies, including Pacific (Pet.Appx., p. 11b).

Petitioners, six employees of Western Electric, filed an action in the district court alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (Pet.Appx., pp. 2a, 2b-3b). They challenged certain Bell System practices concerning the deployment and coordination of the workforce within the Bell System (Pet.Appx., pp. 1a, 13a). In particular, petitioners claim that restrictions on employee transfer within the Bell System violate the antitrust laws (Pet.Appx., pp. 1a-2a), asserting: 1) that there

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2. Pacific is now a wholly owned subsidiary of AT&T (see supra, p. i, n. 1).

was an agreement that Pacific would not consider for employment any craft employees of Western Electric; 2) that Pacific agreed not to hire any Western Electric craft employees unless the employee resigned from Western and waited six months; 3) that Pacific and Western Electric agreed that no craft employee from Western Electric would be hired by Pacific without a release from Western; and 4) that Pacific and Western Electric agreed not to compete for each other's craft employees (Pet.Appx., pp. 4a, 2b-3b).

The district court granted defendants summary judgment on the antitrust claims, and dismissed the pendent state law claims without prejudice (Pet.Appx., p. 4b). The Court of Appeals for the Ninth Circuit affirmed (Pet.Appx., pp. 1b-17b). It held that Section 1 of the Sherman Act was not violated because AT&T, Western Electric, and Pacific constituted a "common enterprise" (Pet.Appx., p. 10b) *and*

> [t]he personnel agreements challenged by these plaintiffs are matters of internal policy with no anticompetitive effect on those *outside the corporate family*" (Pet.Appx., pp. 16b-17b; emphasis added).

The Court of Appeals held that plaintiffs' Section 2 claim alleged monopolization of a telephone systems market, for which they lacked standing, and that, in any event, the alleged monopolization of telephone systems was not causally related to the personnel policies in question (Pet.Appx., pp. 14b-17b). On August 17, 1982, the Court of Appeals denied a petition for rehearing (Pet.Appx. C).

ARGUMENT

Petitioners wholly miss the point. Their argument to this Court is based on their erroneous assertion that the Court of Appeals held that "some level of affiliation, by owner-

ship and control, operates to exempt separate corporations from the conspiracy provisions of § 1 of the Sherman Act" (Pet., p. 12). But the Court of Appeals carefully noted that "[c]ommon ownership and control will not insulate corporations from the impact of antitrust laws if they 'hold themselves out as competitors'" (Pet.Appx., p. 7b; quoting *Kiefer-Stewart Co. v. Seagram & Sons* (1951) 340 U.S. 211, 215). The decision below did not "fashio[n] a 'common enterprise' exemption" (Pet., p. 16), but instead properly concluded that the actions of the affiliated Bell companies touched only internal operations and had no anti-competitive consequences outside the corporate family.

Contrary to petitioners' erroneous assertion, the Court of Appeals did not hold that only "two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations" (Pet., p. 20). In any event, the decision below on petitioners' Section 2 claim was also based on the independent ground that there was no causal connection between the alleged monopolization and the challenged personnel policies.

I. THE RULING BELOW—THAT INTERNAL MANAGEMENT PRACTICES CONCERNING THE TRANSFER OF PERSONNEL WITHIN DEFENDANTS' "CORPORATE FAMILY" DO NOT VIOLATE SECTION 1 OF THE SHERMAN ACT—IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

In rejecting petitioners' argument that defendants' personnel practices violated Section 1 of the Sherman Act, the Court of Appeals held that these "are matters of internal policy with no anti-competitive effect on those outside the corporate family" (Pet.Appx., pp. 16b-17b). The record demonstrates that the employment practices challenged by petitioners involved no one outside the Bell System "corporate family"; the defendant companies had no policies concerning movement of employees outside the Bell System (Pet.Appx., p. 12b).

Petitioners erroneously characterize the decision below as holding that common ownership or common control grants defendants an immunity from the conspiracy provisions of Section 1 (Pet., pp. 11-17). But the court below explicitly recognized that

> "[c]ommon ownership and control will not insulate corporations from the impact of antitrust laws if they 'hold themselves out as competitors.' *Kiefer-Stewart Co. v. Seagram & Sons,* 340 U.S. 211, 215 (1951). Accord: *Perma Mufflers v. Int'l. Parts Corp.,* 392 U.S. 134, 141-142 (1968); *United States v. Yellow Cab Co.,* 332 U.S. 218, 227 (1947) • • •" (Pet.Appx., p. 7b).

Petitioners' reliance upon cases holding that two or more legally distinct, but affiliated, corporations have the "ability" to conspire in violation of Section 1 (Pet., pp. 12-14, 15) misses the point: the Court of Appeals ruled that "[*e*]*ven if* [*defendants*] *possessed the capacity to conspire,* the personnel agreements in question do not violate § 1 if the corporate entities are sufficiently affiliated for the matter to be one of internal management" (Pet.Appx., p. 10b; emphasis added), "with no anti-competitive effect on those outside the corporate family" (Pet.Appx., pp. 16b-17b).

Petitioners erroneously assert that Western Electric and Pacific are "actual or putative competitors" (Pet., p. 14) and that the Bell System's personnel policies were intended to eliminate competition between Western and Pacific in the markets for craftspersons' services and the sale of telecommunications services (Pet., p. 14). The record is to the contrary (see Excerpt of Record (9 Cir.) pp. 276, 357-358, 627-629, 713, 871-872, 875-876, 1302-1303).

There is no basis for petitioners' contention (Pet., pp. 14, 15, 16-17) that the court below failed to examine the competitive purpose and effect of the challenged practices. At most, petitioners quarrel with the Court of Appeals' analysis of the undisputed facts; it is beyond dispute that the

legal principles applied by the Court of Appeals are in accord with the decisions of this Court and the various Court of Appeals decisions cited by petitioners.

Petitioners also contend that the ruling below is inconsistent with various decisions holding that restraints on the right to pursue an occupation violate Section 1 and common law (Pet., pp. 18-20). Again, petitioners fail to come to grips with the distinction between practices which lawfully affect an employee's mobility within a "corporate family" and practices which blacklist employees with other employees. As the Court of Appeals pointed out, the Bell System's personnel transfer policy "restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, [thus] Section 1 is not violated" (Pet.Appx., p. 12b).

II. THE COURT BELOW DID NOT RULE THAT ONLY CUSTOMERS AND COMPETITORS HAVE STANDING TO ASSERT SHERMAN ACT SECTION 2 VIOLATIONS. IN ANY EVENT, THE COURT BELOW PROPERLY RULED THAT, INDEPENDENT OF ANY STANDING ISSUE, THE MONOPOLIZATION ALLEGED BY PETITIONERS WAS NOT CAUSALLY RELATED TO PETITIONERS' ALLEGED INJURIES.

Petitioners alleged in their claim under Section 2 of the Sherman Act that Western Electric monopolized the market for sales, distribution, manufacture and installation of telephone systems (Pet.Appx., p. 14b). Contrary to petitioners' assertion, the Court of Appeals did not hold that only "two categories of persons, customers and competitors, have standing to assert Sherman Act § 2 violations" (Pet., p. 20). The decision below made no mention of any such limitation upon Section 2 claims (see Pet.Appx., pp. 13b-16b). Thus, petitioners' argument that a requirement limiting Section 2 standing to customers and competitors would "contraven[e] decisions of this Court" (Pet., p. 20) is wholly irrelevant.

In any event, the Court of Appeals also rejected petitioners' Section 2 claim on an independent ground not involving the purported issue of standing suggested by petitioner. The Court of Appeals held that "[a] further infirmity in the § 2 claim is the absence of a causal connection between the alleged monopolization and the personnel policies" (Pet.Appx., p. 15b). The record simply does not show that the personnel transfer policies challenged by petitioners affected or furthered any alleged monopolization by Western Electric of a telephone systems market.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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